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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930

No. 330

TWIN CITY PIPE LINE COMPANY AND INDUSTRIAL OIL & GAS COMPANY,

Petitioners,

vs.

HARDING GLASS COMPANY,

Respondent.

REPLY BRIEF OF PETITIONERS

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CALVERT-McBRIDE PRINTING CO., FT. SMITH, ARK.

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THE FACTS

The question presented for determination does not turn upon any dispute as to the facts. The Trial Court made a complete statement of the facts, based upon the undisputed evidence, and this finding was not disturbed by the Court of Appeals. We have no quarrel with the statement of facts made by the Trial Court or by the Court of Appeals. If Respondent's brief gives the Court any information as to these facts not afforded by Petitioners' statement, so much the better.

POINT ONE

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL ON THE SAME MATTER.

In the petition and original brief, it was pointed out that the decision below was in conflict with the decision of the Court of Appeals for the Tenth Circuit in *Griffin, et al v. Oklahoma Natural Gas Corporation*, 37 Fed. (2nd) 545.

Counsel for respondent contends (pages 17 to 20 of their brief) that there is no conflict between the decisions in the Griffin case and the instant case, because the decision in the instant case deals with the public policy of Arkansas, while the decision in the Griffin case deals witn the public policy of Kansas. But the decision of the Court below is not based upon any rule of public policy peculiar to the State of Arkansas, as evidenced by constitutional or statutory provisions, or rulings of the Supreme Court, of that state. Nor was the decision in the Griffin case on the point under discussion based upon any rule of public policy peculiar to the State of Kansas, as evidenced by constitutional or statutory provisions, or rulings of the Supreme Court, of that state. On the contrary, both decisions on the point were based upon alleged general principles of the common law as to what contracts are void because in restraint of trade and therefore contrary to public policy. In the Griffin case this clearly appears from the decisions cited in support of the Court's conclusion on this point and from the absence of any reference to any constitutional or statutory provisions in the State of Kansas bearing on that point. In the instant case the Court below cited in support of its ruling only authorities dealing with general principles of the common law and said:

> "The constitution of Arkansas (Art. II, Sec. 19) contains this provision: 'Perpetuities and monop-

olies are contrary to the genius of a republic and shall not be allowed.' No specific determination is found in the statutes or decisions of the Supreme Court of Arkansas applicable to the exact situation. That court has decided many questions involving alleged restraints of trade, * * * in recognition of the *common law principles* applicable." (Italics ours.)

We think it manifest from a reading of these cases that both were based solely upon a consideration of common law principles. The respective Circuit Courts of Appeal simply reached different conclusions in applying the same general rule of law. It follows that the distinction attempted to be made by counsel for respondents is without foundation.

It is also argued on page 25 of Respondent's brief that in the Griffin case "the furnisher of gas (Oklahoma Natural Gas Corporation) was not a public utility," and the same thought runs through page 17 of Respondent's brief. It is specifically pointed out in the Griffin case (page 547) that the Oklahoma Natural Gas Corporation purchased the contracts "together with certain physical properties of the Southern Kansas Gas Company and made formal application to the Public Service Commission for authority to acquire such contracts and physical properties" and that the Commission authorized the assignments. The definition of a public utility in the Kansas statutes (Section 66-104, Revised Statutes 1923) includes oil and gas pipe line companies. From the opinion, it is plain that Oklahoma Natural Gas Corporation was a public utility. *Fort Smith Spelter Company v. Clear Creek Oil & Gas Company*, 267 U. S. 231. That the contracts (in the Griffin case) may not have been

originally entered into with a public utility is immaterial, in view of the fact that they were assigned to, and carred out and enforced by, a public utility.

Respondent further contends on page 18 of their brief, and elsewhere, that there is no conflict between these decisions, because in the Griffin case the decision turns on whether the contract was "void because in restraint of trade," while in the case at bar the contract was declared "void because against public policy." This alleged distinction is without merit. A contract is void as in unreasonable restraint of trade (where it violates no anti-trust statute) only because such a contract is opposed to public policy. The Court below held that the contract involved in the instant case was void on the ground that the covenantee was a public utility and the contract *tended* to prevent competition, while in the Griffin case the Court of Appeals for the Tenth Circuit held that contracts of precisely the same kind were not void although one of the parties was a public utility. The attempt by counsel for Respondents to distinguish the Griffin case on the alleged economic ground that contracts for the supply of municipal plants are for the public good is unfounded, since competition in the supply of gas should be of as much, or as little, advantage to one set of consumers as to another.

On its facts, the case of *Montgomery Traction Company v. Montgomery Light and Water Power Co.*, 229 Fed. 672, is in direct conflict with the holding of the Court below in the instant case.

Point Two

THE DECISION OF THE COURT BELOW DECIDES AN IMPORTANT QUESTION OF GENERAL LAW IN A WAY THAT IS UNTENABLE AND IN CONFLICT WITH THE WEIGHT OF AUTHORITY.

Counsel for Respondent points out that "requirements contracts" cannot disregrad public policy. That, of course, is true but Petitioner's point is that such contracts uniformly have been held to be valid and that the cases so holding are authorities in support of the proposition that such contracts are not opposed to public policy on the ground of being in unreasonable restraint of trade or otherwise and have never been so considered. Nor is any exception to this rule in the case of public utilities supported by authority. The case of *Coombs v. Burke* is the only case cited that tends to support this proposition while the contrary rule is supported by the cases cited on pages 14 and 15 of Petitioner's brief.

The undisputed proof is that the Citizens Pipe Line Company is not a public utility but is a mere instrumentality used by the Harding Glass Company for supplying itself with its own gas (R. 16-148-201-218-219), after it had contracted to take its gas requirements for its existing plants from Petitioner. This was conceded by counsel at the trial (R. 221). It can hardly be called a competitor, as its acts are in effect the acts of the consumer, Harding Glass Company.

No fair question can exist as to the adequacy of the considerations supporting the contract or that its obligations were mutual.

Point Three

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE APPLICABLE LOCAL DECISIONS ON AN IMPORTANT QUESTION OF LOCAL LAW.

The Court below held the contract void as against public policy—presumably the public policy of the State of Arkansas, as no federal question was involved. For the reasons heretofore pointed out, we think it apparent that the Court's decision was based on what it considered to be the general provisions of the common law applicable. Counsel for Respondent, in support of the contention that the contract is contrary to the public policy of Arkansas, refer to Section 19 and other sections of Article II of the Constitution of Arkansas (quoted but apparently not relied on by the Court below in its opinion), the case of *Cap F. Bourland Ice Co. v. Franklin Utilities Co.*, 180 Ark. 770, the *Arkansas Anti-Trust Law* (which Counsel concede does not prohibit the contract) and certain other Arkansas decisions which clearly are not in point. Section 19 of Article II of the Constitution referred to is in a part of the Constitution of 1874 and was in force when the decisions of the Supreme Court of Arkansas cited in our original brief, relative to contracts in restraint of trade, were announced. That section has never been regarded by the Supreme Court of Arkansas as prohibiting contracts in partial restraint of trade and in fact has been construed as not prohibiting a monopoly on the part of public service companies. As construed by the Supreme Court of Arkansas, it prohibits monopolies only in connection with businesses which are open as a matter of common right to all

and for the conduct of which no franchise from the state or subdivision thereof is required. The case of *Cap F. Bourland Ice Co v. Franklin Utilities Co.* makes this entirely clear. The proposed monopoly in the ice business involved in that case was condemned solely on the ground that the conduct of the ice business is a matter of common right and requires no franchise for its conduct. The Court in that case expressly recognizes the validity of exclusive franchises to public service companies and bridge companies and for ferries. It seems clear, therefore, that Section 19 of the Constitution as construed by the Supreme Court of Arkansas contains no prohibition applicable to gas companies. On the contrary, the statutes of Arkansas (C. & M. Digest, 7492, quoted in Appendix to our original brief) expressly authorize the creation of a monopoly on the part of gas utilities. It is difficult to understand on what theory a contract of a gas utility, which clearly does not create a monopoly and is only claimed to *tend* in that direction, can be held to be illegal as opposed to the public policy of Arkansas when the statutes and decisions of the Supreme Court of that state expressly declare that a monopoly on the part of a gas utility is not illegal.

The Arkansas decision which does come nearest to the exact question at issue is *Fort Smith Light & Traction Co. v. Kelley*, 94 Ark. 461. The Trial Court relied upon this decision, the Court below ignored it, and Counsel dismiss it as mere obiter. (Respondent's brief, page 49). Dicta or not, it is the last word of the Supreme Court of Arkansas on the subject.

It is also argued that the contract is unreasonable

because it is for the life of the gas field. In *Webster v. Williams,* 62 Ark. page 101, the Court said:

> "Was the contract void? Contracts in restraint of trade are either general or partial. Where the contract is unlimited as to space, it is general; where it is *limited as to space,* it is partial, although it may be unlimited as to time. * * * * Contracts in partial restraint of trade, if they are reasonable and founded upon a legal consideration, will be enforced."

The above is in exact accord with the opinion of this Court in *Fowle v. Park,* 131 U. S. 88, where contracts limited as to space but unlimited as to time were upheld against the plea that they were in unreasonable restraint of trade. The contract in the instant case was not only limited geographically, but was also limited to two existing plants.

In *Warmack v. Major Stave Company,* 132 Ark. 173, the Supreme Court of Arkansas said with reference to a contract between a public utility and one of its customers:

> "The principle that the company must supply all impartially and without discrimination does not prevent it from entering into reasonable arrangements or agreements with its customers growng out of special circumstances."

It is submitted that the contract in question merely laid down reasonable business provisions with respect to the furnishing of gas in the quantities covered by the contract, and was not in unreasonable restraint of trade, and that there exists no public policy of the State of Arkansas prohibiting or making illegal such a contract, as is evidenced by the statutes and ruling of the Supreme Court of Arkansas.

Conclusion

The thought expressed in *Hall Mfg. Co. v. Western Steel & Iron Works* (C. C. A. 7), 227 Fed. 588, 593, that in all cases of this kind there must be balanced against the public interest that is opposed to restrictive covenants that other public interest which demands honesty and fidelity among our business men, finds support in *Baltimore and O. S. R. Co. v. Voigt*, 176 U. S. 498, where the followng was quoted with approval:

> "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract."

Respectfully submitted,

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